Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

PAUL ERLANDSON, BEN CHARLESTON HUGGINS, FRANKLIN S. LEE, JR., STEVEN XAVIOR HAWLEY,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in cases of criminal trespass at an abortion clinic, the Court of Appeals erred in holding that evidence excluded by the Trial Court did not meet certain requirements of the Texas statutory defense of third person, *Tex. Penal Code*, § 9.33, namely,

- the existence of unlawful force or unlawful deadly force, and

- a showing that Petitioners could protect the unborn from purported harm from either the clinic staff or their own mothers,

where Petitioners attacked collaterally *Roe v. Wade*, 410 U.S. 113 (1973), on constitutional and jurisdictional grounds, and certain of the excluded evidence showed that, as a result of the activities of some protestors at the clinic that day, a particular unborn child was saved from death by abortion;

2. Whether the Court of Appeals erred in upholding the Trial Court's exclusion of defense evidence developed in bills of exceptions and offers of proof which was relevant and material to such defense of third person, where one aspect of such defense attacked *Roe* collaterally;

3. Whether the Court of Appeals erred in upholding the Trial Court's denial of a special instruction to the Jury on the defense of third person which encompassed a collateral attack against *Roe*;

QUESTIONS PRESENTED (Cont.)

4. Whether the Court of Appeals erred in stating that, as an intermediate appellate court, it was bound by the precedents of *Roe*, where Petitioners attacked *Roe* collaterally on constitutional and jurisdictional grounds and the Court did not address the merits of such attack;

5. Whether this Court should reconsider and overrule *Roe* as violative of the U.S. Constitution and fundamental principles of personal jurisdiction;

6. Whether this Court should reconsider and overrule *Roe* for additional reasons; and

7. Whether this Court should grant the Petition and reverse the Judgments with instructions that the Court of Appeals reconsider its Judgment and Opinion in light of the holdings and direction of *Webster v. Reproductive Health Services*, No. 88-605, decided on July 3, 1989.

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OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. 1-20) is reported at 763 S.W. 2d 845.

JURISDICTION

The Judgment of the Court of Appeals was rendered on December 15, 1988 (Pet. App. 21). A timely Joint Motion for Rehearing was overruled by that Court on January 12, 1989. On April 26, 1989, the Court of Criminal Appeals of Texas refused Petitioners' Joint Petition for Discretionary Review (Pet. App. 26-27). (Judge Teague, however, would grant as to Petitioner Erlandson.) A timely Joint Motion for Rehearing was denied by that Court on May 24, 1989, as to Petitioner Huggins, and was denied on June 7, 1989, as to the remaining Petitioners (Pet. App. 28-29). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION:

5th Amendment:

* * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *.

14th Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

By Informations filed in County Criminal Court at Law No. 8 of Harris County, Texas ("Trial Court"), Petitioners were charged with criminal trespass of a certain building in Harris County, Texas, by entering and remaining therein after receipt of notice to depart, in violation of *Texas Penal Code*, § 30.05. The building in question was the Metropolitan Gynecological Group, an abortion clinic located in Houston, Harris County, Texas ("Clinic").

Following a joint trial by a 6-person Jury in May, 1987, Petitioners were found guilty as charged. Each Petitioner was sentenced to a jail term of 180 days, which was probated for 180 days, and to pay a fine of $550.00, which was not probated. The sentences were in accord with the assessments and probation recommendations by the Jury.

On appeal, the Court of Appeals affirmed all such Judgments and overruled subsequently Petitioners (Joint) Motion for Rehearing. The Court of Criminal Appeals refused Petitioners' Joint Petition for Discretionary Review. (Judge Teague, however, would grant as to Petitioner Erlandson.) On May 24, 1989, the Court denied Petitioners' Joint Motion for rehearing as to Petitioner Huggins, and, on June 7, 1989, denied the Motion as to the remaining Petitioners.

The pertinent facts are these:

A. *Certain Trial Evidence.* 1. *The Trespasses.* On December 13, 1986, about 20 men entered the lobby of the Clinic carrying pamphlets and pro-life signs. Petitioners and a few others walked through the lobby, into a hallway from a door marked "no admittance" and into the back area of the Clinic. In the meantime, Ms. Edna Williams, the Clinic Director, yelled at the group to leave, said "get the gun", yelled for the Security Guard, Lionel Matthews, to stop them and called the Houston Police Department.

Mattews saw the Petitioners going down the hallway and yelled for them to stop, and, when they continued, he grabbed and restrained them physically (S.F. 107-108,

157-160). He dragged or placed Petitioners in Exam Room B of the Clinic, told them to stay there and shut the door.[1]

Petitioner Hawley attempted unsuccessfully to leave the room (S.F. 330, 405). Hawley and Petitioner Lee locked themselves to an examination table inside the room, and Hawley glued his hands together through the lock with superglue.

The police arrived about 20 minutes later. The police asked whether Ms. Williams had asked them to leave and, when she told them she had, they asked her to do so again in their presence. She complied and an officer also requested Petitioners to leave. Petitioners did not leave (or indicate any desire to leave). Hawley and Lee were extricated, and they as well as Erlandson and Huggins were placed under arrest. Petitioners went limp and were dragged off and eventually placed in jail. They were released later that day.

2. *Certain Defense Evidence.* All Petitioners testified in their own defense. They were concerned about the abortion procedures at the Clinic that day and went there to address same. *Lee* testified that he entered the Clinic "[t]o stop unborn babies from being killed", that he had a conscious desire to stop the killing and that he felt that he could stop the killing by walking into the Clinic (S.F. 371-372, 377). *Huggins* testified that they had gone into the Clinic "merely to plead with the owner or the doctor for the lives of the children", that he entered for such purpose, and that when Ms. Williams asked them to leave he said "no" and "pled for the lives of the children" (S.F. 435, 438-439, 446). *Erlandson* said that he and others operated as rescuers that day; that a rescuer is someone who "directly interposes his body between an abortion doctor and his patient"; that he refused to leave the Clinic on Ms. Williams' terms because she would not agree to stop

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[1] Mattews testified that he told them to leave and when they did not he placed them in Exam Room B. This was contradicted by the testimony of each Petitioner.

the medical procedures planned for that day; that he could not leave due to a primary and a secondary cause, the primary cause being that he felt that God was ordering him not to leave and the secondary one being that if he left the "procedures would continue that day"; and that he told the police that they could not leave because otherwise they would not stop the killing (S.F. 391, 415, 416, 418). *Hawley* said that one purpose he had in entering the Clinic was to gain a platform to let the people in the Clinic hear his views on what they were doing; that there was a larger purpose for the group, including himself, and that that related to the procedures at the Clinic; and that when he entered the Clinic he had a conscious desire that had to do with such greater object, not to commit trespass (S.F. 259-261, 270).

B. *Certain Excluded Evidence.* Petitioners relied, in part, on the defense of necessity, defense of third person and defense of protection of life or health, as prescribed under Texas statutory law. The Trial Court ruled that those defenses were not applicable or germane to the case. As a result, and outside the presence of the Jury, certain testimony was taken on bills of exceptions or set forth in offers of proof. The Trial Court refused to admit such evidence.

1. *Bill of Exceptions of James Oehlke.* James Oehlke testified, in part, that on Saturday morning, December 13, 1986, he, his Wife and his Daughter, Jennifer, went to the Clinic for an abortion for Jennifer; that it was a two day procedure which had been commenced at the Clinic the day before; that they were told that Jennifer's life would be endangered if they did not have her back at the Clinic at 9 o'clock; that after they arrived they took the elevator up (to the Clinic) and observed a lot of people there; that the Clinic would not let them inside, and neither he nor Jennifer entered it; that protestors talked to him concerning his Daughter; that they made him "face reality"; that his morals told him "not to do the abortion"; that the

protestors had an effect on him with regard to the abortion decision and to leave the Clinic area; that they left the area and went to see Dr. Lucci in Houston; that Dr. Lucci took Jennifer on as a patient; that Jennifer was expected to deliver any day; that he and Jennifer were thankful for what the protestors did; and that had the protestors not been there he probably would have gone through with the abortion and "regretted it for life" (S.F. 278-285).

2. *Offer of Proof as to Jennifer Oehlke.* Defense Counsel stated that they would except Jennifer Oehlke to testify, pertinent portions of which were as follows: That she is the Daughter of James and Susan Oehlke; that she is 16 years old and lives with her parents in Rosenberg, Texas; that she is pregnant and in her last trimester of pregnancy; that on December 12, 1986, she went to the Clinic to commence an abortion procedure; that laminaria were inserted in her reproductive organ and she was to return to the Clinic on the following day; that, on December 13, 1986, she and her parents went to the Clinic to complete the abortion procedure; that there were quite a few people in the lobby area, and pro-life and pro-choice women approached her and her mother and began to talk to them concerning the potential procedure; that, as a result of the conversation, pro and con, she decided against completing the abortion; that she and her parents drove to a nearby Crisis Pregnancy Center in Houston where an arrangement was made for her to be seen by Dr. Joseph Lucci; that Dr. Lucci examined her the same day and removed the laminaria; that he has her under his care as a prenatal patient; that she is expected to deliver within three weeks before June 12 (1987); and that she is thankful for the protestors, for the people who talked to her (S.F. 455-457).

3. *Offer of Proof as to Dr. Joseph Lucci.* Defense Counsel stated that they would except Dr. Lucci to testify, pertinent portions of which were as follows: That he is a medical doctor, specializing in obstetrics and gynecology,

is licensed by the Texas State Board of Medical Examiners and has practiced obstetrics and gynecology for a number of years; that he has a maternity patient named Jennifer Oehlke whom he took on as a patient on December 13, 1986; that, on that day, he examined her and removed laminaria which he found in her cervix area; that the purpose of the laminaria is to absorb moisture and to cause dilation of the cervix; that the cervix is the bottom opening of the womb which leads into the birth canal; and that she is expected to deliver within three weeks before June 12, 1987 (S.F. 459-460).

After being qualified as an expert witness to give medical, scientific opinions regarding pregnancy, Defense Counsel said that he would expect Dr. Lucci to testify further, including that human life begins at fertilization; that the human genetic code is present at that time; that this code maps out the physical, mental and emotional qualities of the developing human being and creates a unique individual being; that, during the first trimester of pregnancy, the heart commences to beat, human brain waves are detectable and the unborn child feels pain and responds to other stimuli; that the unborn child is alive, is human and is a separate being; that he is familiar with the abortion technique called dilation and evacuation ("D & E"); that the life of the unborn child is destroyed in such an abortion; and that, in his opinion, Jennifer Oehlke was scheduled for a D & E abortion (S.F. 460-462).

4. *Bill of Exceptions of Petitioner Hawley.* Petitioner Hawley testified, in part, that abortions are preformed at the Clinic; that Saturdays are most popular for abortions; that he knew of no reason to believe that Saturdays at the Clinic would be any different than Saturdays at other abortion clinics in the geographic area or that the Clinic would not be doing abortions that day; that he had several purposes in entering the Clinic on December 13, 1986, which he specified, including that he tried to delay the procedures or gain time so that individuals in the group could talk to the women, and that he wanted to

talk to Clinic personnel and convince them not to do abortion procedures; that he was concerned intensely about the women entering the Clinic that day for abortions because his understanding of women who have had abortions "is that all of them feel guilt without exception; that it's something that they can never change, that they must live with [it] for the rest of their lives, that many of them do it only because they think there is no choice where there really is, and that they suffer much more damage when they do have one than if they would not" (S.F. 466); that he was concerned equally about their unborn children because it was "very hard to have a – much quality of life if they're cut in little pieces (sic)" (S.F. 466); that he believed that more than a few of them were in "[d]anger of being executed" (S.F. 470); that there was an emergency situation as to such unborn children in terms of imminent danger; that he tried to protect the unborn children from those who were paid to kill them; that he "tried to delay the processes, and to talk to the clinic people who performed these procedures and convinced (sic) them not to do them" (S.F. 470); that he believed that his purpose in entering the clinic was fulfilled; and that he ascertained that abortions did not take place while he was at the Clinic (S.F. 465-471, 473, 478-479).

At the conclusion of such testimony, the Trial Court inquired, "Will there be any different testimony from any of the other witnesses?" (S.F. 479). Subsequently, the evidence (from Hawley) was proffered for all of the Petitioners, and the Court was re-urged to permit the evidence to be adduced before the Jury on said defenses (S.F. 479-480).

C. *Request for Special Jury Instructions*. The Defense presented five special instructions to the Jury – one on the defense of necessity, three on the defense of third person and one on the defense of protection of life or health (E.g., Tr. Erlandson 48, 50-59). One of the instructions on the defense of third person was based on the

unlawfulness of abortion under Texas statutory law which was before this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and provided, in pertinent part:

> You are instructed further that it is unlawful for any person in Texas to administer designedly to a pregnant female or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatever externally or internally applied to procure thereby an abortion except where abortion is procured or attempted by medical advice for the purpose of saving the life of the mother. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

The Trial Court denied all such special instructions consistent with its prior rulings on said defenses (S.F. 516).

D. *Federal Questions*. The defense of third person requires that the third person for whom the actor intervenes be subjected to *unlawful* force or *unlawful* deadly force (*Tex. Penal Code*, § 9.33). As shown above, the Jury heard some, but not all, of the defensive evidence, and the Trial Court denied Petitioners' special instruction based on the unlawfulness of abortion under Texas statutory law before this Court in *Roe* ("said instruction").

On appeal, Petitioners contended, *inter alia*, that the evidence was sufficient to raise the defense of third person; that the unlawful force element of the defense of third person was met by abortion, including that "abortion is unlawful under Texas anti-abortion law which is still in effect because *Roe v. Wade* * * *, which purported to hold such law unconstitutional, is itself void as violative of the U.S. Constitution and laws and fundamental principles of personal jurisdiction";[2] that *Roe* was void on various constitutional and jurisdictional bases; that "third person" under the defense of third person included the

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[2] For the text of former *Tex. Penal Code* arts. 1191-1194, 1196, see *Roe*, 410 U.S. at fn. 1, p. 117.

pregnant female and her unborn child; that the Trial Court erred in denying said instruction; and that the Trial Court erred in not allowing the Jury to hear evidence on the bills of exceptions and offers of proof, above, because such evidence was relevant to said defenses, including the defense of third person (Brief of Appellants in Erlandson et al v. Texas, Tex. App., 14th Dist., pp. 31-32, 33-36, 39-42, 71-76, 79).

The Court of Appeals ignored Petitioners' collateral attack against *Roe v. Wade*. In addition, it ruled that Petitioners' bills of exceptions and offers of proof failed to meet two of the other necessary elements of Section 9.33, namely, (1) the existence of unlawful force or unlawful deadly force either in the performance or the seeking of abortion and (2) the absence of any showing that Petitioners could protect the unborn from the Clinic staff or their own mothers within the meaning of Section 9.33. It upheld the Trial Court's exclusion of such evidence and the denial of said instruction.

Petitioners challenged these rulings (and others) and pressed their collateral attack against *Roe* before that Court (on Motion for Rehearing) and before the Court of Criminal Appeals (on Joint Petition for Discretionary Review and on Joint Motion for Rehearing). Such challenges and collateral attack were unsuccessful. Petitioners also challenged unsuccessfully (on Motion for Rehearing in the Court of Appeals and on Joint Petition for Discretionary Review and on Joint Motion for Rehearing in the Court of Criminal Appeals) the determination by the Court of Appeals that, as an intermediate appellate court, it was bound by the precedents of *Roe*.

While *Roe* was challenged collaterally below, Question 5 (seeking reconsideration and overrule of *Roe* as violative of the U.S. Constitution and fundamental principles of personal jurisdiction) is strictly for this Court. Questions 6 (seeking reconsideration and overrule of *Roe* for other reasons) and 7 (seeking reconsideration by the Court of Appeals in light of the holdings and direction of

Webster v. Reproductive Health Services, No. 88-605, decided on July 3, 1989) were not raised below. They are strictly for this Court.

ARGUMENT

I.
THE TEXAS STATUTORY DEFENSE OF THIRD PERSON, ONE APPLICATION OF WHICH IN THIS CASE CONSTITUTED A COLLATERAL ATTACK AGAINST ROE V. WADE, WAS APPLICABLE AND SUPPORTED LEGALLY AND EVIDENTIALLY
(Questions 1-4)

A. *Background.* At the trial, Petitioners raised the Texas statutory defense of third person, *Tex. Penal Code*, 9.33 (as well as the statutory defenses of necessity and protection of life or health). Section 9.33 provides as follows:

> A person is justified in using force or deadly force against another to protect a third person if:
>
> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the *unlawful force* or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person. (Emphasis added.)

1. *Evidence.* The evidence showed, in part, that the Clinic provided comprehensive care for women, including abortions; that the only patients were women; that 27 patients were scheduled at the Clinic on December 13, 1986; that patients came to or were inside the Clinic that day; that Petitioners and others entered the Clinic that day; and that the larger purpose of the group (of protestors) related to the "procedures" at the Clinic. These

"procedures" were those of abortion. As Lee put it, he entered the Clinic "[t]o stop unborn babies from being killed" (S.F. 371-372). Huggins said that when Ms. Williams asked them to leave he said "no" and "pled for the lives of the children" (S.F. 438-439). According to Erlandson, he and others operated as rescuers that day (S.F. 391).

2. *Excluded Evidence.* The Trial Court excluded substantial evidence contained in bills of exceptions and offers of proof, including the effect of the protest on the decision of Miss Jennifer Oehlke and her parents not to complete an abortion procedure commenced on Miss Oehlke the day before and the saving of the life of Miss Oehlke's unborn child. See pp. 4-6, *supra.*

3. *Abortion as Unlawful Force.* Petitioners maintained that the "unlawful force" involved was that of abortion since that practice violates, *inter alia,* the Texas anti-abortion laws which this Court purported to hold unconstitutional in *Roe v. Wade, supra,* 413 U.S. 113,[3] and that such laws are still in effect because *Roe* itself is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction.

B. *The Merits.* The Court of Appeals ruled that the excluded evidence failed to meet two necessary elements of Section 9.33, namely, the existence of unlawful force or

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[3] Petitioners also maintain that abortion constituted the necessary unlawful force in two other areas, *i.e.,* that it violates (1) Texas tort law of assault, battery and negligence *vis-a-vis* unborn children, "unlawful" being defined as criminal and/or tortious [*Tex. Penal Code,* § 1.07(a)(36)], and (2) certain anti-abortion law revived in Texas as a legal effect of *Roe* (assuming *Roe* to be a valid decision). The three requested special instructions to the Jury on the defense of third person – which the Trial Court denied – postured the unlawful force element in accordance with the three areas of illegality, with a different area of illegality for each such special instruction.

unlawful deadly force in the performance or in the seeking of abortions, and a showing that Petitioners could protect the unborn from purported harm from either the Clinic staff or their mothers within the meaning of Section 9.33 (Pet. App. 10, 11).[4] It upheld the Trial Court's exclusion of the evidence in the bills of exceptions and offers of proof, above, and its denial of said instruction (Pet. App. 12, 14).

All of these rulings were erroneous. The ruling that the excluded evidence failed to meet the unlawful force or unlawful deadly force requirement of Section 9.33 (Pet. App. 10) ignores the abortion activities of the Clinic *vis-a-vis* Petitioners' collateral attack against *Roe v. Wade, supra,* 410 U.S. 113.

As shown in Section II of this Petition at pp. 14-19, below, such attack is valid, and *Roe* is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction. Accordingly, the Texas anti-abortion

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[4] The Court of Appeals did not exclude the unborn from coverage under Section 9.33 as third persons. This was correct. Since "third person" is not defined under the *Texas Penal Code,* resort to the Code Construction Act, *Vernon's Tex. Civ. Stat. Ann.* art. 5429b-2, is required. *Tex. Penal Code,* § 1.05(b). The common usage or understanding standard of that Act would operate to cover an unborn child as a "third person." See *Webster's Third New International Dictionary of the English Language, Unabridged* (G & C Merriam Co., Springfield, Mass.) (1971), pp. 1686 ("person" as an individual human being) and 338 ("child" as an "*unborn* or recently born *human being*"). (Emphasis added.) This squares with legal reality since the legal status and rights posture of an unborn child is well established under Texas (and other) law. See pp. 17-19, below. *Ogas v. State,* 655 S.W. 2d 322, 325 (Tex. App. – Amarillo 1983, no writ), which held to the contrary, is incorrect since the Court relied on the *Texas Penal Code* definitions of "person" and "individual" instead of focusing on the meaning of the critical noun, "third person", which is not defined in such code.

laws which this Court purported to invalidate in *Roe* are still in effect, and the abortion activities of the Clinic, in violation of such laws, constituted the necessary unlawful force within the meaning of Section 9.33. Unborn children are protected under such laws.[5]

The Court's further ruling that there was no showing that Petitioners "could protect" the unborn from "purported harm" from the Clinic's staff or their own mothers (Pet. App. 11) does not square with the evidence adduced or with the excluded evidence concerning Jennifer Oehlke. See Statement of the Case at pp. 3-7, above.

Against this background, the excluded evidence, in conjunction with such collateral attack, met the requirements of Section 9.33, and such evidence should have been admitted and said instruction should have been given to the Jury.

II.

ROE V. WADE SHOULD BE RECONSIDERED AND OVERRULED AS VIOLATIVE OF THE U.S. CONSTITUTION AND FUNDAMENTAL PRINCIPLES OF PERSONAL JURISDICTION (Question 5)

A. *Threshold Matters.* At the threshold, it is well established that if a court in the United States violates the U.S. Constitution in a proceeding before it, *it loses jurisdiction to proceed to judgment,* and any "judgment" which it might enter would be *void.* See *Johnson v. Zerbst,* 304 U.S. 458, 467-468 (1938); *Windsor v. McVeigh,* 93 U.S. 274, 277-284 (1876). This Court is capable of violating the U.S. Constitution. See *Erie R. Co. v. Tompkins,* 304 U.S. 64,

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[5] The Court's related assertion that, as an intermediate appellate court, it was bound by the precedents set out in *Roe* (Pet. App. 10) is erroneous since *Roe* is void as violative of the U.S. Constitution and fundamental principles of personal jurisdiction. See pp. 14-19, below.

77-78, 79-80 (1938), where the Court even *admitted* that it and lower federal courts had done so with application of the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842). Compare *Plessy v. Ferguson*, 167 U.S. 537 (1896), with *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Since it is difficult at best to amend the Constitution, the Court should be sensitive to calls for re-examination under appropriate circumstances. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J. dissenting).

B. *Roe v. Wade Violates the U.S. Constitution and Fundamental Principles of Personal Jurisdiction.* Petitioners submit respectfully that *Roe* should be overruled as violative of the U.S. Constitution and fundamental principles of personal jurisdiction. Supportive positions are presented below.

1. *No Representation.* Neither abortion "survivor" children nor unborn children threatened and endangered by abortion were represented before the U.S. District Court or this Court in *Roe*. Abortion " survivor" children born in this country are U.S. citizens (with extremely minor exceptions), yet they are doomed to die and die primarily due to prematurity, abortional injury or lack of care. Unborn children, with well recognized legal postures under the laws of the United States, Texas and other States, are killed outright by abortion. Abortion "survivors" and unborn children are persons or entities with legal personalities under the Due Process Clause of the 5th Amendment to the U.S. Constitution. The Judgments of the U.S. District Court and this Court in *Roe*, rendered without any representation of such victims by guardian or next friend (or by counsel for such guardian or next friend), constituted naked deprivations of life, liberty and property without due process of law, in violation of such 5th Amendment. Accordingly, such Judgments are unconstitutional and void as to them. See U.S. Const., 5th Amendment (Due Process Clause); *McArthur v. Scott*, 113 U.S. 340, 391-392, 404 (1885) (Unborn Children); *Pennoyer*

v. Neff, 95 U.S. 714, 733-734 (1878) (U.S. Citizens); Rule 19, *F.R. Civ. Proc.*

2. *No Personal Jurisdiction.* Neither the U.S. District Court nor this Court had personal jurisdiction over such abortion "survivor" children or unborn children in *Roe*. Yet such children were affected vitally by those proceedings, and had a right to be before the Courts through next friends or guardians (or by counsel for such guardians or next friends). The Judgments of such Courts, therefore, were unconstitutional and void as to them. *Ibid.*

Moreover, this deficiency operated to divest the U.S. District Court and this Court of authority to pronounce judgment affecting them personally. Neither the unborn children who were conceived and killed by abortion after *Roe* nor the abortion "survivor" children after *Roe* could be affected jurisdictionally by *Roe* in their rights posture, yet they die from *Roe*. The Judgments of such Courts, rendered without personal jurisdiction over such infant victims, are void as violative of fundamental principles of personal jurisdiction. See *McArthur v. Scott, supra,* 113 U.S. at 391-392, 404; *Pennoyer v. Neff, supra,* 95 U.S. at 733-734.

3. *Invidious Discriminations.* The discriminations perpetrated in *Roe* against abortion "survivors" and unborn children as compared to the nonaborted born and corporations are invidious and deprive such children of life, liberty and property without due process of law, in violation of the 5th Amendment to the U.S. Constitution. Corporations, which are artificial beings and not mentioned in the Constitution, are "persons" under the Due Process Clause of such 5th Amendment and under the Due Process and Equal Protection Clauses of the 14th Amendment thereof, while actual unborn human beings, recognized in law and possessive of substantial legally cognizable rights, are denied such personhood. A prematurely born child of 7-month gestational age has 14th Amendment personhood while an older and more developed unborn child of 8-months gestational age does not.

Such crazy quilt discriminations are violative patently of due process under such Amendment.

4. *Failure To Apply Levy v. Lou[illegible]ana, 391 U.S. 68 (1968), Concerning Human Personhood Under the 14th Amendment.* The Court failed to apply the "live," "human" and "having a being" test of 14th Amendment personhood postulated by it in *Levy v. Louisiana*, 391 U.S. 68 (1968), to the affected unborn children. If a constitutional interpretive decision can be overlooked or disregarded, how can it be maintained that such a decision has "law of the land" ranking? See U.S. Const., Art. VI (Supremacy Clause).

5. *Failure To Apply the Constitutional Implied Rights Concept to 14th Amendment Personhood for the Unborn.* Since a born person has 14th Amendment recognition, and since such a person does not originate at birth, it follows that 14th Amendment recognition extends to such person prenatally. The person after birth is the selfsame person before birth, only at a different developmental stage. The human genetic code is present at fertilization.

6. *Failure To Apply Properly the Constitutional Implied Rights Concept to "Liberty" Under the 14th Amendment.* While "liberty" is a broad concept, "life" is the most basic of rights for, without it, all other rights and interests are meaningless. Where was the correlation between "liberty" and the right to destroy unborn life? Or the basis for the "fundamental" ranking of such right? Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Not only was abortion a crime at common law and in Texas, but the legal and social heritage of this Nation viewed abortion not as a "right" but as a naked wrong. Moreover, the Constitution protects the life rights of persons against certain governmental deprivations, and *nowhere* does it give any human being the right to destroy the life of another. If the implied rights decisions of this Court were applied properly, the life right of the unborn would have prevailed clearly over any liberty to destroy the same.

7. *Naked Deprivations of Rights.* The Due Process Clause of the 5th Amendment stood as a bar to this Court's Judgment in *Roe* which endangered the rights of abortion "survivors" and authorized the destruction of a large body of legally cognizable rights of the unborn. See *Marbury v. Madison,* 5 U.S. 137, 163 (1803); *Munn v. Illinois,* 94 U.S. 113, 130 (O.T., 1886).

In Texas, an abortion "survivor" would be a U.S. and Texas Citizen (with extremely minor exceptions) per the Citizenship Clause of the 14th Amendment, U.S. Constitution, and entitled to citizen protections under Article I, Section 19, of the Texas Constitution; a "person" within the protective reach of the Due Process and Equal Protection Clauses of such Amendment; a "person" within the "open courts" provision of Article I, Section 13, of the Texas Constitution; an "individual" within the protection of the *Texas Penal Code* [See *Tex. Penal Code,* § 1.07(a)(17).]; a "child" under the Texas Family *Code,* § 11.01(1), and the tort law of Texas; and would have the same rights, powers and privileges of a child born in Texas after the normal gestation period (*Tex. Family Code,* § 12.05).[6]

Similarly, unborn children are recognized legally and have substantial legal rights in Texas, etc. Since rights cannot and do not exist *in vacuo,* legal statuses stem therefrom.[7] For example, an unborn child is recognized

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[6] This Court appeared to be unaware that children might survive abortions. Yet children are born alive after abortions. See, e.g., *Showery v. State,* 690 S.W. 2d 689, 694, 695-696 (Tex. App. – El Paso, 1985, pet. dis. rev. ref.). They exist in the most monstrously hostile environment imaginable for a defenseless child – where the "mother" abandons her child, where the abortionist is paid (in most cases) to deliver a dead baby, and where the attendants are employees of the abortionist or the abortion facility.

[7] Under English law, the legal status and rights posture of an unborn child was recognized by a substantial body of law,

(Continued on following page)

under the prenatal tort injury doctrine [*Yandell v. Delgado*, 471 S.W. 2d 569 (Tex. 1971)]; is entitled to receive a monetary award for the wrongful death of his father [*Brantley v. Boone*, 34 S.W. 2d 409, 411 (Tex. Civ. App. – Eastland, 1931, no writ)]; is entitled to be represented in judicial proceedings which affect him or her [*McArthur v. Scott, supra*, 113 U.S. at 391-392, 404 (involving unborn children not even in gestation)]; is entitled to have his or her mother undergo a life-saving blood transfusion

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(Continued from previous page)

statutory and case. E.g., 12 Ch. II, c. 24, §§ VIII and IX (1660) (representation by a testamentary guardian, with authority to sue to protect the interests of the unborn child); *Reeve v. Long*, 83 E. Repts. 754 (House of Lords, 1695) (vesting of a remainder interest in real property), as codified in 10 & 11 Wm. III, c. 16 (1699); *Lutterel's Case* (c. 1660), referred to in *Hale v. Hale*, 24 E. Repts. 25, 26 (Ch., 1692) (representation in judicial proceeding and award of an injunction to stay waste of property interests). The unborn child was considered a "Person in rerum Natura" [*Wallis v. Hodson*, 27 E. Repts. 642, 643-644 (Ch., 1740)]; was "in esse, according to the rule of the civil law" [*Millar v. Turner*, 27 E. Repts. 907, 908 (Ch., 1747-1748); had "an existence in the eye of the law" [*Burdet v. Hopegood*, 24 E. Repts. 484 (Ch., 1718)]; and was "living *** in ventre sa mere" [*Beale v. Beale*, 24 E. Repts. 373 (Ch., 1713)].

On the criminal side, abortion of a live unborn child was an offense at common law [e.g., Blackstone, *Commentaries on the Laws of England*, Vol. I (c. 1765), pp. 129-130, and Vol. IV (c. 1769), p. 198; see III Chitty, *A Practical Treatise on the Criminal Law* (London, 1816), pp. 798-801], and continued so into the laws of this country [e.g., II *Wharton's Criminal Law* (14th ed., by Charles E. Torcia, 1979), § 250, p. 415; Swift, *A System of Laws of the State of Connecticut*, Vol. I (1795), pp. 177-178, and Vol. II, p. 299; *Mills v. The Commonwealth*, 13 Pa. St. 630, 632 (S.C. Pa., 1850); *State v. Slagle*, 83 N.C. 544 (S.C.N.C., 1880)]. "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[*Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537, 538 (S.C.N.J., 1964), *cert. denied*, 337 U.S. 985]; and is entitled to compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* [*Tex. Employers' Ins. Co. v. Shea*, 410 F. 2d 56, 61, 62 (C.A. 5, 1969)]. A remainder interest in real property may vest in an unborn child [*Crisfield v. Storr*, 36 Md. 129, 146 (Ct. App. Md., 1872)]. So too with a beneficial interest under a trust [*Medlock v. Brown*, 136 S.E. 551, 553 (S.C. Ga., 1927)].[8]

8. *Manufacture of the Right of Abortion, Etc.* In *Roe*, this Court violated Article III of the U.S. Constitution by *creating* a constitutional liberty of abortion and by restricting the states of their reserved constitutional authorities to legislate in this area of substantial state interest. Cf. *Bowers v. Hardwick, supra*, 478 U.S. 186. This violated also the division of powers concept, as recognized in the 10th Amendment to the Constitution. See *Erie R. Co. v. Tompkins, supra*, 304 U.S. at 77-78, 79-80.

III.

ROE V. WADE SHOULD BE RECONSIDERED AND OVERRULED FOR ADDITIONAL REASONS (Question 6)

The collateral attack on *Roe v. Wade, supra*, 410 U.S. 113, set forth in Section II of the Argument, above, looks to reconsideration and overrule of *Roe* on constitutional and jurisdictional grounds. *Roe* should be reconsidered

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[8] Under Texas statutory law, a suit to terminate the parent/child relationship may be brought after the first trimester of pregnancy (*Tex. Family Code*, § 15.021), and the unborn child is to be represented therein, with exceptions not here pertinent [See *id.*, § 11.10(a).]. Further, children who were unborn at the time of the death of their father or other relation may take, as posthumous children, under the intestate laws of Texas or under the will of their father. See *Tex. Probate Code*, §§ 41(a), 67(b).

and overruled for additional reasons, namely, that *Roe* has produced various unintended consequences, and that important factual or other errors were made by the Court in that case.

A. *Unintended Consequences*. *Roe* has produced consequences or results which this Court did not intend:

1. *Abortion on Demand*. In *Roe*, this Court made it clear that a pregnant woman does not have an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses" (410 U.S. at 153). The Constitution does not require "abortion on demand" (410 U.S. 208, Burger, C.J., Concurring Opinion). In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court said that *"Roe v. Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand" (410 U.S. at 189). The opposite, as the Court may well take note, has occurred and continues. Well over one million unborn children are killed by abortion in this Nation each year. Abortion "survivor" children, practically all of whom are U.S. citizens, die also from abortion or its "ethic." Even where a state proscribes abortion after viability, with life and health exceptions per *Roe*, the "health" meaning under *Doe* is so broad as to make such proscription more form than substance.

2. *Effect of Abortion and the Abortion "Ethic" on Children Who "Survive" Abortion*. Abortions and applications of the abortion "ethic" bring about deaths of U.S. citizen children who continue to live *after* they have been aborted. These children die primarily as a result of prematurity, abortional injury or lack of care. Sometimes they are killed outright. See, e.g., *Showery v. State, supra,* 690 S.W. 2d 689. Moreover, since "unsuccessful" abortions (i.e., those resulting in live births) could translate into legal claims against the abortionists, etc., "success" is encouraged legally – to the naked detriment of infant U.S. citizens. *Stills v. Gratton*, 127 Cal. Reptr. 652, 657, 658-659

(Cal. App., 1st Dist., 1976); see *The Ladies Center of Clearwater, Inc. v. Reno*, 341 So. 2d 543 (Fla. App. 2d, 1977).

3. *Internal Legal Chaos.* *Roe* has introduced legal chaos in Texas and other domestic U.S. Jurisdictions relative to unborn children. They have substantial legal recognitions and rights, yet they may be killed by abortion. See pp. 17-19, above. A "duty of care" is owed to the unborn child under the prenatal tort injury doctrine. How can the "law" recognize a legal status and rights posture in an unborn child while at the same time authorizing the destruction of such child by abortion on demand per *Roe*? This makes the continued existence of legal rights depend upon the desires of others – hardly an object of what "law" should be.

B. *Factual or Other Errors.* In *Roe*, the Court made a number of factual or other errors, most of which appear to have influenced improperly some of the holdings of the Court. These are discussed briefly below.

1. *Erroneous Claim as to When the States Began Generally To Replace the Common Law with Legislation.* The Court said that "[i]t was not until after the war between the States that Legislation began generally to replace the common law" (410 U.S. at 139). This made it *appear* that State anti-abortion legislation was a latter-19th century development, and it *enhanced unfairly* the Court's "far freer" abortion practice view.

The fact of the matter is that, when the War between the States ended (April-May, 1865), there were only 36 States of the United States and, of that number, 27 States had anti-abortion statutes then in effect. See Dissenting Opinion of Justice Rehnquist in *Roe v. Wade*, 410 U.S. at fn. 1, pp. 175-176.

2. *Erroneous Purpose Ascribed to State Anti-abortion Statutes in the Late 19th and Early 20th Centuries.* As for the "original purpose" of state anti-abortion statutes, the Court said that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the

woman's health rather than in preserving the embryo and fetus" (410 U.S. at 151). It cited *State v. Murphy*, 27 N.J.L. 112, 114 (S.C. N.J., 1858), as an example authority for such statement. This statement and its context made it *appear* that the statutes were outdated purpose-wise, maternal health being protected by medical advances in the interim, and enhanced unfairly the Court's liberty to abort holding.

The fact of the matter is that, in the late 19th and early 20th centuries, state courts made it quite clear that the purposes or objects of their anti-abortion statutes were to protect or safeguard *either* the unborn child *or* the mother *and* the unborn child.[9] The Court's reliance on *Murphy* was poor because the Supreme Court of New Jersey pointed out *subsequently* that the statute which the *Murphy Court* construed "was further extended March 26th, 1872* * **to protect the life of the child** * * *." *State v. Gedicke, supra*, 43 N.J.L. at 90. (Emphasis added.) Moreover, *Murphy* appears to stand alone, *not* as an example of authority for the Court's statement, above.

3. *Unfair Portrayal of the Common Law Concerning Abortion, as Expounded by Edward Coke.* The Court provided an *unfair picture* of the Common Law as to abortion by referencing Cyril Means, Jr. ["The Phoenix of Abortional Freedom", etc., 17 *N.Y.L.F.* 335 (1971)] and Lawrence Lader [*Abortion* (1966), pp. 78-79], each of whom was active in the movement for the repeal of the abortion laws. See Nathanson, *Aborting America* (N.Y. 1979), pp. 55, 154 and 174 (Means), and pp. 29-36, 47-71, 82, 85, 116, 148-157, 163, 168, 172 and 307 (Lader). Means was especially critical of Coke's statements concerning abortion.

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[9] E.g., *State v. Howard*, 32 Vt. 380, 399 (S.C. Vt., 1859) (mother and child); *Dougherty v. People*, 1 Colo. 514, 523 (S.C. Colo., 1872) (mother and child); *State v. Gedicke*, 42 N.J.L. 86, 89-90 (S.C.N.J., Feb. Term, 1881) (mother and child); *State v. Watson*, 1 P. 770, 771, 772 (S.C. Kan., 1883) (child).

The Court should have examined Coke's abortion statements [Coke, III *Institute on the Lawes of England* (posth. c. 1644), pp. 50-51] in light of (1) the common law authorities, (2) the nature of a common law crime, i.e., "acts injurious to the public morals" or "acts which are mala in se" [Clark, *Handbook of Criminal Law* (3rd ed.) (1915), pp. 24, 25], and (3) how Coke was treated in this regard by English courts and legal scholars.

In this latter regard, the Court of Chancery, in describing the rights of unborn children, said that the destruction of an unborn child was "murder" [*Millar v. Turner, supra,* 27 E. Repts. at 908 (preceded by a reference to 3 Coke, *Inst.* 50)], and referred to the live birth murder rule described by Coke [*Beale v. Beale, supra,* 24 E. Repts. 373 and *Burdet v. Hopegood, supra,* 24 E. Repts. 484, citing the *Beale* case]. While Sir Matthew Hale, who was Chief Justice of the King's Bench from 1671-1676, disagreed with the live birth murder rule, he agreed that it was a "great misprison" if a woman quick with child took or another gave her "a potion to cause abortion," or if one struck her "whereby [the] child within her is killed ***." II Hale, *The History of the Pleas of the Crown* (1st Am. Ed., with notes, etc. by Stokes and Ingersoll) (Phil., 1847), p. 563. The writings of William Hawkins, Thomas Wood and William Blackstone (all before 1803) were consistent with Coke's live birth murder and abortion statements. 1 Hawkins, *A Treatise of the Pleas of the Crown* (c. 1716) (Curwood, London, 1824), ch. 13, pp. 94-95; I Wood, *An Institute of the Laws of England* (3rd ed., Holborn, Eng.) (1724), ch. 1, p. 11; I Blackstone, *Commentaries on the Laws of England, supra,* pp. 129-130; IV Blackstone, *Commentaries on the Laws of England, supra,* p. 198.[10]

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[10] The Preamble to Lord Ellenborough's Act referred to abortion and other acts as "heinous Offenses," and an indictment was returned for the offense of abortion shortly before enactment in 1803 of that Act. III Chitty, *supra, A Practical Treatise on the Criminal Law,* pp. 798-801.

4. *Erroneous Implication that Only a Minority of U.S. Jurisdictions Treated the Abortion of a "Quick" Unborn Child as a Crime.* The Court said that "[t]his is of some importance [the alleged contradiction of Coke and the claim that abortion after quickening was never established as a common law crime] because while *most* American Courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, *others* followed Coke in stating that abortion of a quick fetus was a 'misprison,' a term they translated to mean 'misdemeanor' " (410 U.S. at 135). (Emphasis added.) This made it *appear* that only a *minority* of U.S. Jurisdictions treated the abortion of a "quick" unborn child as a crime, and *buttressed unfairly* the Court's conclusion as to the "far freer" prevailing abortion practices in the major part of the 19th century (410 U.S. at 158).

The fact of the matter is that where the woman was "quick with child," *all* courts which considered the question (to Petitioners' knowledge) said that abortion was a crime, etc. at common law. E.g., *State v. Steadman*, 51 S.E. 2d 91, 93 (S.C.S.C., 1948); *Commonwealth v. Parker*, 50 Mass. 263, 266 (S.J. Ct. Mass., March Term, 1845); *Smith v. State*, 33 Me. 48, 55, 57 (S.C. Me., 1851); *State v. Alcorn*, 64 P. 1014, 1016 (S.C. Idaho, 1901). Where the woman was not "quick with child," *most* courts which considered the question said that abortion was not an offense at that stage of pregnancy. However, a *respectable minority* of U.S. courts concluded that it was an offense to abort at any stage of pregnancy. *Mills v. The Commonwealth, supra*, 13 Pa. St. at 632-633; *State v. Slagle, supra*, 83 N.C. at 545; *State v. Reed*, 45 Ark. 333, 334-336 (S.C. Ark., 1883); *Munk v. Frink*, 116 N.W. 525, 527 (S.C. Neb. 1908).

5. *Erroneous Use of Maternal Mortality Rates.* The Court said, "[m]ortality rates for women undergoing *early abortions*, where the procedure is legal, appear to be as low as or lower than the rates for *normal childbirth*" (410 U.S. at 149). (Emphasis added. Footnote omitted.) The

Court used this (1) to show that the concerns of the States in enacting their anti-abortion statutes of protecting women from a hazardous procedure were no longer valid, and (2) to support the Court's conclusion as to when the State's interest in protecting maternal health became "compelling."

The Court, however, *misused* what it had noticed: The proper mortality comparison was not female deaths from "early abortions" versus female deaths from childbirth because the subjects of comparison were markedly different. Childbirth lasts 3 trimesters; "early abortions" occur in or around the first trimester. The proper procedure would have been to compare the number of maternal deaths resulting from a *specified number of early abortions* with the number of maternal deaths in or around the first trimester resulting from the same number of *early pregnancies*. The Court's use of the mortality rates, in short, was palpably erroneous and unfair.[11]

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[11] The Court apparently was unaware of the facts (1) that the concept of human fertilization was not understood until after the discovery of the mamalian ovum (of a dog) in 1827 [Flanagan, *The First Nine Months of Life* (N.Y., 1962), Preface, p. 9], thereby making substantially less significant the failure of the later Common Law to cover abortions before the woman was "quick with child"; and (2) that the first anti-abortion enactment in this country was that of the New York City Common Council of July 27, 1716, which, *inter alia*, prohibited midwives, under penalty of fines or jail terms in default of payment, from giving counsel or administering any "Herb Medicine or Potion, or any other thing to any Woman being with Child *whereby She Should Destroy or Miscarry of that she goeth withall before her time*" [*New Perspectives on Human Abortion* (ed. by Hilgers, Horan and Mall) (Frederick, Md., 1981), ch. 15, p. 199, citing "Minutes of the Common Council of New York" 3 (1712-1729): 121, at fn. 2, p. 203 (Emphasis added.)], thereby showing a serious early concern for the problem of abortion and without reference to any "quick with child" distinction.

IV.

THE JUDGMENT AND OPINION OF THE COURT OF APPEALS SHOULD BE RECONSIDERED IN LIGHT OF THE HOLDINGS AND DIRECTION IN WEBSTER V. REPRODUCTIVE HEALTH SERVICES (Question 7)

As shown above, the Court of Appeals ignored Petitioners' collateral attack against *Roe v. Wade, supra,* 410 U.S. 113, and failed to take into account certain excluded evidence when it ruled that the bills and offers of proof failed to meet two of the necessary elements of *Tex. Penal Code,* § 9.33. After stating that, as an intermediate appellate court, it was bound by the precedents of *Roe,* it indicated that *Roe* and three other cases[12] *"preclude[d] appellants' use of the third person protection defense in this case* no matter how dedicated and sincere their motives" (Pet. App. 10-11). (Emphasis added.) Thus, the Court appeared to be influenced unduly by *Roe* in its interpretation or application of Section 9.33. Not only was this incorrect, but Petitioners' rights to the protection of Section 9.33 were prejudiced.

In addition, the Court ruled that Petitioners' bills and offers of proof did not satisfy the first two subsections of the necessity defense, *Tex. Penal Code,* § 9.22 (Pet. App. 10, 11). The Court said that it was undisputed that the Clinic was a facility licensed to perform abortions, that nothing in the bills tended to show "that the clinic's staff or its patrons were acting other than within the constitutionally recognized principles which permit abortion", and that, accordingly, Petitioners' "personal beliefs will not constitutionally suffice to outweigh the present status of the

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[12] *Ex parte Aldridge,* 334 S.W. 2d 161, 164 (Tex., 1969); *Brady v. Doe,* 598 S.W. 2d 338, 339 (Tex. Civ. App. Houston, 14th Dist., 1980, writ ref'd. n.r.e.), *cert. denied,* 449 U.S. 1081 (1981); *Bobo v. State,* 757 S.W. 2d 58, 62 (Tex. App. – Houston, 14th Dist., 1988, pet. ref'd.), *cert. denied,* ___U.S.___ (1989).

law" (Pet. App. 11). The Court, however, did not consider the collateral attack against *Roe*, and appeared to be influenced unduly by two cases supporting *Roe* in Texas, *Brady v. Doe, supra*, 598 S.W. 2d 338, and *Bobo v. State, supra*, 757 S.W. 2d 58. Again Petitioners' rights were prejudiced.

Petitioners submit that the Judgment should be reversed with instructions that the Court of Appeals reconsider it and its Opinion in light of the holdings and direction of this Court in *Webster v. Reproductive Health Services*, No. 88-605, decided July 3, 1989. Petitioners believe that the *Webster* holdings and direction operate to relax the restrictive grip of *Roe*, and that the new legal climate engendered by *Webster* should impact favorably upon their cases *vis-a-vis* application of the statutory defenses of necessity and of third person, *Tex. Penal Code*, §§ 9.22, 9.33, respectively.

CONCLUSION

For the reasons and authorities set forth, above, it is submitted respectfully that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1989

APPENDIX

OPINION OF THE COURT OF APPEALS
(December 15, 1988)

Affirmed and Opinion filed December 15, 1988.

(SEAL)
In The

Fourteenth Court of Appeals

NO. B14-87-00323-CR
NO. C14-87-00417-CR
NO. C14-87-00423-CR
NO. A14-87-00424-CR

PAUL ERLANDSON, BEN CHARLESTON HUGGINS,
FRANKLIN S. LEE, [JR.] &
STEVEN XAVIOR HAWLEY, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause Nos. 925,219; 925,217; 925,216; & 925,218

OPINION

This is a trespass case. TEX. PENAL CODE ANN. § 30.05 (Vernon Supp. 1988). Appellants Paul Erlandson, Ben Charleston Huggins, Franklin S. Lee[, Jr.] and Steven Xavior Hawley firmly believe that abortion is murder. In an attempt to stop the abortion procedures to be performed on December 13, 1986 at a women's clinic located

in Harris County, the appellants intentionally trespassed at the clinic. The jury rejected appellants' not guilty pleas and assessed each appellant a one hundred and eighty day jail sentence and a $500 fine. The court probated the sentences on the jury's recommendation. Appellants raise twenty-six points of error in their appeal from their misdemeanor convictions. We affirm.

In their first two points of error, the appellants maintain the trial court erred when it overruled their motions to quash the informations. Points of error twenty-one and twenty-five assign fundamental error based on the informations. Points of error three through eleven and fifteen through nineteen address the justification defenses the appellants attempted to raise at trial: necessity; defense of third persons; and protection of life or health. Appellants claim the trial court erred because it refused to permit jury voir dire, to admit evidence, and to instruct the jury concerning those defenses. In points of error twelve and thirteen, appellants contend the trial court erroneously overruled objections and refused to grant a mistrial. In point of error fourteen, the appellants maintain the trial court permitted and furthered misconduct by the prosecutor during his cross-examination of appellant Hawley. Point of error twenty questions the prosecutor's jury argument and points of error twenty-two and twenty-three address the court's charge. In point of error twenty-four, appellants maintain the trial court should have instructed the jury to find Hawley and Lee not guilty. In their twenty-sixth point of error, the appellants contend the State violated their due process rights by calling a rebuttal witness whose testimony contradicted theirs.

The Metropolitan Gynecological Group ["the clinic"] was on the sixth floor of an office building in Harris County, Texas. Appellants were among several protestors carrying pro-life signs and pamphlets who arrived in the lobby of the clinic shortly after it opened on December 13, 1986. Edna M. Williams, the clinic's officer manager, asked the protestors to leave the lobby but the appellants defied her and walked into the procedures area of the clinic through a door marked "no admittance." Williams paused to instruct a security guard to keep the protestors out of the medical areas and then called the police. The security guard shouted for the appellants to stop, but restrained them physically when they continued walking toward the medical area. He also asked the appellants to leave. When they refused, the security guard ushered them into an examining room and shut the door, but did not lock it. By that time, more protestors had gathered outside the building and in the lobby. Some banged on the door and tried to enter the clinic's administrative office.

Appellants remained in the examining room. When the police arrived, they found appellants Hawley and Lee bound to an examination table with "Superglue" and U-shaped "Kryptonite" locks. After Hawley and Lee told the officers they had no key to the locks, the police used alcohol to dissolve the Superglue and applied jelly to their feet to extricate them from the locks.

In their first point of error, the appellants contend the trial court erred when it overruled their motion to quash because the informations violated TEX. CODE CRIM. PROC. ANN. art. 21.09 (Vernon Supp. 1988). We disagree. Article 21.09 states that a description of real property is sufficient

if the indictment or information alleges "its general locality in the county, and the name of the owner, occupant or claimant thereof." No one disputes that the clinic is real property. The informations alleged the appellants had entered and remained on the property of Edna M. Williams after receiving notice to depart and therefore sufficiently alleged ownership of the property for purposes of Article 21.09. *See also*, TEX. CODE CRIM. PROC. ANN. art. 21.08 (Vernon Pamph. Supp. 1988). However, the information did not allege the real property's "general locality in the county," as Article 21.09 requires when the charging instrument alleges real estate "qua object of the offense." *See Franks v. State*, 688 S.W.2d 502, 503 (Tex. Crim. App. 1985) (en banc).

Since the appellants filed motions to quash the informations, the controlling question on appeal is whether they had adequate notice to prepare their defense. *Opdahl v. State*, 705 S.W.2d 697, 699 (Tex. Crim. App. 1986) (en banc), quoting *Adams v. State*, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986) (en banc). The first step in answering that question is to decide whether the informations failed to convey a requisite item of notice. *Id.* Assuming, without deciding, that the real estate is the object, rather than the situs, of the offense of criminal trespass, *see Franks*, 688 S.W.2d at 503, the informations did fail to allege the property's general location in Harris County. Accordingly, the dispositive issues are whether the failure to allege the general location in Harris County had an impact on the appellants' ability to prepare a defense, and if it did, how great an impact. *Opdahl*, 705 S.W.2d at 699; *accord*, *Adams*, 707 S.W.2d at 903 (erroneous denial of

a motion to quash is not reversible error absent harm to the accused).

The record shows that the appellants suffered no harm by the State's failure to allege the general location in Harris County. Approximately one week before trial, the State filed a motion in limine which the trial court heard on the day immediately prior to trial, along with the appellants' motion to quash. The purpose of the State's motion was to keep the appellants from referring to abortions or the "medical procedures" performed at the clinic. In the motion, the State specifically referred to the clinic as "the Metropolitan Gynecological Clinic." The State thereby cured the alleged defect in the informations and gave sufficient notice of the real property involved. We hold that the original failure to allege the general location in the county, if it was required under *Franks*, did not have such an impact on appellants' rights that it hampered their ability to prepare a defense. We overrule the first point of error.

In their second point of error, the appellants contend the trial court erred when it overruled their motions to quash the informations because the State failed to allege "what kind of notice was given, who gave such notice, and how it was imparted," which deprived them of knowing "what they would be called upon to defend against," in violation of TEX. CODE CRIM. PROC. ANN. art. 21.11 (Vernon 1966). We disagree. The informations in the instant case tracked Section 30.05 of the Penal Code and charged that each appellant had entered and remained on the property after receiving notice to depart. A charging instrument which uses the same or similar language as the statute proscribing the offense confers jurisdiction on

the court and gives adequate notice to the accused. TEX. CODE CRIM. PROC. ANN. art. 21.17 (Vernon 1966); *see Bobo v. State*, 757 S.W.2d 58, 61 (Tex. App. – Houston [14th Dist.] 1988, pet. pending) (rejecting a similar challenge to a charging instrument). Appellants essentially complain that the State omitted additional evidentiary facts it had no obligation to allege. *See Martinez v. State*, 742 S.W.2d 687, 691 (Tex. Crim. App. 1987) (en banc); *Moreno v. State*, 721 S.W.2d 295, 300 (Tex. Crim. App. 1986) (en banc). Because the informations sufficiently alleged the acts *appellants* committed and were therefore sufficient for purposes of notice and bar, we hold that the trial court properly overruled their motion to quash and overrule the second point of error.

In their twenty-fifth point of error, the appellants maintain their informations did not allege offenses under Texas law because the State failed to allege "who gave them notice to depart in relation to the owner of the property." Appellants concede they have waived all but fundamental error by failing to object to the informations on this ground. TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1988). This court considered and rejected an identical argument in *Bobo*. 757 S.W.2d at 60-61. We overrule appellants' twenty-fifth point of error.

The twenty-first point of error is a multi-pronged challenge to certain testimony, portions of the prosecutor's closing argument, and the court's charge. Appellants question whether the trial court permitted the jury to convict on a theory not alleged in the informations: failure to depart after *written* notice to depart. The informations alleged only "notice to depart" without specifying the type of notice appellants received.

Appellants did not object to testimony that they walked through the door bearing a "no admittance" sign. Therefore, their complaint concerning the testimony presents nothing for review. *Cisneros v. State*, 692 S.W.2d 78, 82 (Tex. Crim. App. 1985) (en banc). By failing to object they also waived any possible error in the prosecutor's referring to the sign during closing argument. *Drew v. State*, 743 S.W.2d 207, 218-21 (Tex. Crim. App. 1987) (en banc). Further, appellants have waived all but fundamental error in the court's charge by failing to object to the portion of the charge which, quoting the exact language of TEX. PENAL CODE § 30.05 (b)(2)(A), defined "notice" as "oral or written communication by the owner or someone with apparent authority to act for the owner," *See Gibson v. State*, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987) (opinion on motion for rehearing, en banc). Accordingly, to obtain a reversal appellants must establish that the court's charge caused them egregious harm in that it denied them a fair trial. *Id.*, citing *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985) (opinion on rehearing, en banc), *cert. denied*, 107 S.Ct. 1901 (1987).

We conclude that the court's defining "notice" pursuant to Section 30.05 (b)(2)(A) of the Penal Code conformed to the unobjected to proof developed at trial and was therefore harmless. We overrule point of error twenty-one.

Points of error three through eleven and fifteen through nineteen address the appellants' attempt to show that certain defenses justified their trespass. Those defenses are necessity, defense of third persons and protection of life and health. TEX. PENAL CODE ANN. §§ 9.22, 9.33 & 9.34 (b) (Vernon 1974). Appellants contend the trial

court violated their rights under the United States and Texas Constitutions by depriving them of these statutorily defined defenses. While appellants maintain that the court erred by refusing to permit them to voir dire the jury, excluding evidence, and refusing to instruct the jury, their complaint centers on the excluded evidence which they preserved for our review through two bills of exception and two offers of proof.

As we also indicated in *Bobo*, 757 S.W.2d at 62, well-settled principles forbid our ordering a reversal based on excluded evidence unless we conclude that the excluded evidence is relevant and, if it is relevant, that the trial court harmed the appellants by excluding it. *Bird v. State*, 692 S.W.2d 65, 73 (Tex. Crim. App.), *cert. denied*, 106 S.Ct. 1238 (1985); TEX. R. APP. P. 81 (b)(2). Because determination of the relevancy of proferred evidence is a matter committed to the discretion of the trial court, appellants must establish an abuse of discretion in order to obtain a reversal. *See Johnson v. State*, 698 S.W.2d 154, 160 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 107 S.Ct. 239 (1986); *Nubine v. State*, 721 S.W.2d 430, 432 (Tex. App. – Houston [1st Dist.] 1986, pet. ref'd); *Dominguez v. State*, 722 S.W.2d 179, 183 (Tex. App. – Houston [14th Dist.] 1986, no pet.); *see also, Werner v. State*, 711 S.W.2d 639, 643 (Tex. Crim. App. 1986) (en banc) (trial court's determination of admissibility of proffered evidence will not be reversed absent showing of clear abuse of discretion). Relevant evidence is evidence that tends to render a contested material issue more or less probable. TEX. R. CRIM. EVID. 401; *Garza v. State*, 715 S.W.2d 642, 644 (Tex. Crim. App. 1986) (en banc); *Johnson*, 698 S.W.2d at 160; *Nubine*, 721 S.W.2d at 434; *accord, Stone v. State*, 574

S.W.2d 85, 89 (Tex. Crim. App. [Panel Op.] 1978) (to be admissible, evidence must be relevant to a contested fact or issue).

In the appellants' first bill of exception, the father of a former patient of the clinic testified that he expected his daughter to give birth very soon and that his daughter and he had changed their minds, after talking with the protestors on the day of the trespass, about completing an abortion procedure the clinic had begun the previous day. Appellants made an offer of proof that the daughter would have confirmed her father's testimony. Appellants also offered that Joseph Lucci, M.D., would testify about when and how human life begins, the biological development of the unborn, certain abortion techniques and the effects of those techniques on the unborn. Each of the appellants joined in a bill of exception in which appellant Hawley testified that in his opinion, the danger to the patients and the unborn created an emergency situation which justified the trespass.

A trial court does not err when it excludes evidence if the evidence fails to show that the accused is entitled to a justification defense. *Roy v. State*, 552 S.W.2d 827, 830-31 (Tex. Crim. App. 1977), *overruled on other grounds in Johnson v. State*, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983) (en banc); *Hoffart v. State*, 686 S.W.2d 259, 264 (Tex. App. – Houston [14th Dist.] 1985, pet. ref'd), *cert. denied*, 107 S. Ct. 95 (1986); *Crabb v. State*, 754 S.W.2d 742, 744 (Tex. App. – Houston [1st Dist.] 1988, no pet. reported); *cf.*, TEX. R. CRIM. EVID. 103 (c) (inadmissible evidence is to be kept from the jury). To show they were entitled to the defense of third persons, necessity, or protection of life and health defenses, appellants' bills of exception and offers of proof

must demonstrate that they met all elements of the defense. *See Roy,* 552 S.W.2d at 830-31.

TEX. PENAL CODE ANN. § 9.33 defines the defense of third persons defense. It states that a person is justified in using force or deadly force against another to protect a third person if:

> (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 of this code in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
>
> (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Appellants focus on the "reasonable belief" element of Section 9.33 and stress their personal convictions that pregnancy terminations threatened the lives of pregnant mothers and their unborn. However, their bills of exception and offers of proof fail to meet two other necessary elements of Section 9.33. Since it is undisputed that the clinic was licensed to perform abortions, nothing in either of the bills suggests *unlawful* force, or *unlawful* deadly force, either in the clinic's performing abortions or the patients' seeking abortions. As an intermediate appellate court we are bound by the precedents set out by the United States Supreme Court set out in *Roe v. Wade,* 410 U.S. 113 (1973). *See Ex parte Aldridge,* 169 Tex. Cr. 395, 400, 334 S.W.2d 161, 164 (1969); *Brady v. Doe,* 598 S.W.2d 338, 339 (Tex. Civ. App. – Houston [14th Dist.] 1980) (per curiam), *cert. denied,* 449 U.S. 1081 (1981); *Bobo,* 757 S.W.2d at 62. These cases preclude appellants' use of the

third person protection defense in this case no matter how dedicated and sincere their motives. There is no showing that appellants could "protect" the unborn from purported harm from either the clinic staff, or their own mothers, within the meaning of Section 9.33.

The necessity defense, codified at TEX. PENAL CODE ANN. § 9.22, requires a showing that:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing [sic] the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

We conclude the evidence which appellants developed in their offers of proof and bills of exception fails to show they were entitled to the necessity defense. As we have noted, it is undisputed that the clinic was a facility licensed to perform abortions. Nothing in appellants' bills of exception tends to show that the clinic's staff or its patrons were acting other than within the constitutionally recognized principles which permit abortion. *See Bobo*, 757 S.W.2d at 63; *Brady*, 598 S.W.2d at 339. Accordingly, appellant's personal beliefs will not constitutionally suffice to outweigh the present status of the law. *See Schermbeck v. State*, 690 S.W.2d 315, 317-18 (Tex. App. – Dallas, 1985, no pet.). Under the circumstances, we therefore hold that appellants' bills of exceptions and offers of proof do not satsify (sic) subsections (1) or (2) of Section 9.22.

The protection of life or health defense, TEX. PENAL CODE ANN. § 9.34 (b), can justify a person's using force or deadly force against another person "when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve [that person]'s life in an emergency." By the express language of the statute, the defense applies only when the defendant has used force. Nothing in the proffered evidence or the record suggests that the appellants used force.

Notwithstanding the appellants' firm and sincerely held beliefs, the dispositive issue in the instant case is simply whether they committed a trespass at the clinic. Yet nothing in their proffered evidence tends to make the State's trespass allegations less probable. *See* TEX. R. CRIM. EVID. 401. Accordingly, the excluded evidence was irrelevant and did not give rise to fact issues of whether Sections 9.22, 9.33 or 9.34 justified the trespass. *Id.; Johnson,* 698 S.W.2d at 160; *Hoffart,* 686 S.W.2d at 263. We therefore hold that the trial court did not abuse its discretion when it excluded the evidence developed in their bills of exception and offers of proof. Since the relevancy of excluded evidence is the threshold issue in our analysis of appellants' excluded evidence points of error, we need not decide whether the exclusion harmed the appellants. *Bird,* 692 S.W.2d at 73. We overrule points of error eight through eleven.

In points of error four through seven, appellants contend the trial court violated due process and deprived them of a fair trial when it granted the State's motions in limine "without hearing evidence or having any offer of proof made." Appellants essentially claim that the trial court erroneously predetermined that their claimed

defenses did not apply to their trespass case. As we indicated in *Bobo*, 757 S.W.2d at 61, because a trial court's limine rulings are always subject to reconsideration, the court did not categorically exclude evidence simply by granting the State's motions in limine. *Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App.), *cert denied*, 423 U.S. 930 (1975); *accord, Romo v. State*, 577 S.W.2d 251, 252 (Tex. Crim. App. [Panel Op.] 1979) (mere granting of a motion in limine cannot constitute reversible error). What is controlling is whether the record of proffered evidence shows that the court *ultimately* acted properly in excluding that evidence. *Norman*, 523 S.W.2d at 671. As our review of appellants' eighth through eleventh points of error demonstrates, the trial court properly excluded the evidence they developed through bills of exception and offers of proof. Accordingly, we find no error in the courts granting the State's motion in limine. We overrule points of error four through seven.

In their third point of error, appellants maintain the trial court infringed on their constitutional right to counsel under the Texas Constitution and violated TEX. CODE CRIM. PROC. ANN. art. 35.16 (c)(2) (Vernon 1966) when it ruled, prior to trial, that it would not permit voir dire concerning the appellants' claimed justification defenses. Article 35.15 (c)(2) provides for a challenge for cause if a juror is biased or prejudiced concerning a defense on which the accused will rely. However, as appellants concede, the defense must be "applicable to the case." *Cf., Santana v. State*, 714 S.W.2d 1, 10 (Tex. Crim. App. 1986) (en banc) (because the evidence at trial did not raise the issue of a claimed lesser included offense, trial court's

limiting voir dire did not mandate reversal). As our previous discussion indicates, the appellants' claimed defenses do not apply to their trespass case under existing law. Accordingly, we find no error in the trial court's limiting voir dire to exclude references to the defense of third person, necessity and protection of life and health defenses. We overrule the third point of error.

We further hold that because the evidence, including the evidence developed in appellants' bills of exception and offers of proof, did not raise any of the three defensive theories appellants proposed[, t]he trial court properly refused to charge the jury on the defense of third person, necessity and protection of life and health defenses. *Sanders v. State*, 707 S.W.2d 78, 80 (Tex. Crim. App. 1986) (en banc); *Brooks v. State*, 642 S.W.2d 791, 799 (Tex. Crim. App. [Panel Op.] 1982). We overrule points of error fifteen through nineteen.

In their twelfth, thirteenth and fourteenth points of error, the appellants contend reversible error resulted from the State's cross examination of appellants Hawley and Huggins. Points of error twelve and thirteen addresses the State's attempt to impeach appellants Hawley and Huggins with statements they made to a probation officer who prepared pre-sentence investigation reports ["PSI's"] before they withdrew their no contest pleas.

During direct examination, Hawley testified that he had "attached" himself to the examination table. During cross examination the prosecutor asked Hawley when he actually decided to stay in the examination room. Hawley equivocated, stating that he decided to "delay" the time

he "remained" in the room and attempted to explain his response. The prosecutor attempted to impeach his testimony with the following contradictory statement: "Three others who had been among the first in were also brought to the room. *At this point we decided to stay in this room as long as we could* to try to convince them to stop the murdering (emphasis added)." Appellants had previously objected, outside the jury's presence, to any use of Hawley's statement and the trial court indicated it would permit use of the statement to show a prior inconsistent statement.

If the State improperly used Hawley's prior statement, we conclude there is no reasonable possibility that the State's reference to the statement might have contributed to the appellants' conviction or punishment. *See* TEX. R. APP. P. 81 (b)(2); *Smith v. State*, 744 S.W.2d 86, 94 (Tex. Crim. App. 1987) (en banc). Because Hawley admitted he attached himself to the table by means of "Superglue" and a lock to which he also admitted he had no key, his decision to stay before the police arrived was, by his own testimony, "obvious to all." We therefore hold that the trial court properly overruled the appellants' objection to the State's reference to Hawley's prior statement and that error, if any, made no contribution to appellants' conviction or punishment. TEX. R. APP. P. 81 (b)(2). We further hold that if the reference to Hawley's statement was error, an average jury would not have found the State's case significantly less persuasive without it. *Schneble v. Florida*, 405 U.S. 427 (1972). Accordingly, we overrule the twelfth point of error.

Although the trial court sustained the appellants' objections and instructed the jury to disregard the State's

attempt to impeach appellant Huggins through his PSI report, they claim, in their fourteenth point of error, that the trial court erred when it refused to grant a mistrial. We conclude that if the State improperly questioned Huggins, the trial court cured any possible error as to Huggins and all the appellants when it instructed the jury to disregard the prosecutor's question. *Guzmon v. State*, 697 S.W.2d 404, 409 (Tex. Crim. App.) (en banc), *cert. denied*, 475 U.S. 1090 (1985); TEX. R. APP. P. 81(b)(2). Since the record does not support the conclusion that the prosecutor questioned Huggins in order to inflame the jury, or that the alleged error caused irreparable damage to him or the other appellants, we overrule the thirteenth point of error. *Id.*

In their fourteenth point of error, the appellants maintain the trial court permitted and furthered cross examination questioning of appellant Hawley, which they claim amounted to prosecutorial misconduct that prejudiced him and all the appellants. On reviewing the entirety of Hawley's testimony, the prosecutor's questions, those objections the appellants did make and the trial court's remarks, we conclude that the trial court properly exercised its role pursuant to TEX. R. EVID. 610. We overrule the fourteenth point of error.

In their twentieth point of error, the appellants maintain the trial court erred because it overruled their objection to a portion of the prosecutor's closing argument. The prosecutor analogized the appellants' agreeing to leave "if you stop the killing" to a person's entering another's home, locking himself to the kitchen table and promising to leave "if you fix me dinner." When the appellants objected "on the grounds of inflammatory

[sic]," the trial court stated "Overruled, final argument." In our opinion, while he analogy may fall short in its application to this case, the court properly overruled the appellants' objection because the prosecutor's argument was a reasonable deduction from the evidence, one of four permissible areas of jury argument. *See Modden v. State,* 721 S.W.2d 859, 861 (Tex. Crim. App. 1986) (en banc), *cert. denied,* 108 S. Ct. 1603 (1988). Even if the remark was improper and arguably inappropriate, we conclude it did not amount to reversible error. Based on its probable effect on the mind of an average juror: 1) it was not manifestly improper, harmful, or prejudicial; 2) it did not violate a statute; and 3) it did not inject new or harmful facts into the case. *Everett v. State,* 707 S.W.2d 638, 640 (Tex. Crim. App. 1986) (en banc). Jurors are quite capable of sifting through such hyberbolic tactics. We overrule the twentieth point of error.

In their twenty-second and twenty-third points of error, the appellants maintain the trial court committed reversible error because it refused the following jury instruction:

> This is a joint trial involving four Defendants. That is to say, four Defendants in four separate informations are being tried in a single trial. You are instructed that guilt or innocence must be determined as to each Defendant on an individual basis. In doing so, you are instructed that evidence applicable only to one, two or three Defendants shall not be used for or against a Defendant or Defendants for whom such evidence is not applicable.

The record also shows that the trial court prefaced its reading of each of the four charges, as follows:

> You are sitting on a jury which is trying four different cases at the same time. You will have a charge on each case. The law that applies to that particular case, and each particular [sic], you should give your independent consideration based upon the charges for the particular case and the facts that were adduced that relate to that particular case.
>
> I will read the charges to you in the order in which they were docketed. And the order in which I read the charges is not intended to any other meaning whatsoever.

We hold that the trial court did not err by refusing the appellants' requested instruction because its oral instructions essentially duplicated the substance of the instruction it refused. *Philen v. State*, 683 S.W.2d 440, 445 (Tex. Crim. App. 1984) (en banc). Consequently, the appellants have failed to show harm. We overrule their twenty-second and twenty-third points of error.

The twenty-fourth point of error raises two complaints. First, appellants content the trial court erred when it refused to render an instructed verdict in favor of Hawley and Lee at the close of the State's case. Because Hawley and Lee joined the remaining appellants' defense after moving for an instructed verdict, they waived any possible error in the denial of the motion. *Kuykendall v. State*, 609 S.W.2d 791, 794 (Tex. Crim. App. [Panel Op.] 1980); *Bobo*, 757 S.W.2d at 65.

Appellants' second complaint, that the trial court erred by "rendering [j]udgments of [c]onviction" against Hawley and Lee, is simply a challenge to the sufficiency of the evidence to support the jury's verdict. Accordingly, the dispositive question is whether, after reviewing the evidence in the light most favorable to the verdict, any

rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (en banc). Focusing on Hawley's and Lee's voluntarily attaching themselves to the examination table and what they perceived to be the threatening presence of the security guard, the appellants essentially argue that the clinic administrator ineffectively notified them to leave before they could actually leave. We disagree. The record shows that both Williams and the security guard asked the appellants to leave the clinic *before* they entered the examining room where Hawley and Lee *later* voluntarily attached themselves to the examining table. Although the appellants denied receiving or hearing such notice, the jury properly reconciled the differing versions of the incident. TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986) (en banc). We hold there was sufficient evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that the appellants received the notice to depart required under Section 30.05 of the Penal Code. We overrule appellants' twenty-fourth point of error.

In their twenty-sixth point of error, the appellants maintain the State improperly called the security guard as a rebuttal witness "because it should have known" that he testified falsely during its case in chief. Appellants base their contentions on what they claim are irreconcilable conflicts between the security guard's version of his conduct and statements and their version. Because the jury properly exercised its role in evaluating the differing versions of the incident, *see* TEX. CODE CRIM. PROC. ANN.

art. 38.04, and because there is nothing to show or suggest that the State knew the security guard testified falsely, we overrule the twenty-sixth point of error.

We affirm the judgment of the trial court.

/s/ George T. Ellis
Justice

Judgment rendered and Opinion filed December 15, 1988.

Panel consists of Justices Pressler, Draughan and Ellis.

Publish. TEX. R. APP. P. 90.

JUDGMENT OF THE COURT OF APPEALS

(December 15, 1988)

DECEMBER 15, 1988.

(SEAL)

JUDGMENT

The Fourteenth Court of Appeals

PAUL ERLANDSON, BEN CHARLESTON HUGGINS, FRANKLIN S. LEE, [JR.] & STEVEN XAVIOR HAWLEY, APPELLANT[S]

NO. B14-87-00323-CR
NO. C14-87-00417-CR V.
NO. C14-87-00423-CR
NO. A14-87-00424-CR

THE STATE OF TEXAS, APPELLEE

This cause came on to be heard on the transcript of the record of the court below. The same being considered, it is the opinion of this Court that there was no error in the judgment. It is ordered by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

NOTIFICATION OF ORDERS OF THE COURT OF APPEALS OVERRULING (JOINT) MOTION FOR REHEARING

(January 12, 1989)

(Letterhead and other printed material omitted.)

January 12, 1989

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00323-CR TRIAL COURT CASE NO. 925219

STYLE: Erlandson, Paul V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

January 12, 1989

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00424-CR TRIAL COURT CASE NO. 925218

STYLE: Hawley, Steven Xavior V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

January 12, 1989

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00417-CR TRIAL COURT CASE NO. 925217

STYLE: Huggins, Ben Charleston V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

January 12, 1989

Hon. Richard W. Schmude
P.O. Box 674
Tomball, TX 77375

Hon. Kathlyn Giannaula
Assistant District Attorney
201 Fannin
Suite 200
Houston, TX 77002

RE: CASE NO. 14-87-00423-CR TRIAL COURT CASE NO. 925216

STYLE: Lee, [Jr.,] Franklin S. V: The State of Texas

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

Hon. Ray Hardy
District Clerk, Harris County
Attention: Criminal Division
P. O. Box 4651
Houston, TX 77210

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS REFUSING JOINT PETITION FOR DISCRETIONARY REVIEW

(April 26, 1989) (Insignificant matters omitted.)

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 26, 1989
COA#: 14-87-00323-CR

RE: Case No. 0233-89
STYLE: Erlandson, Paul

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE TEAGUE WOULD GRANT.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 26, 1989
COA#: 14-87-00424-CR

RE: Case No. 0236-89
STYLE: Hawley, Steven Xavior

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 26, 1989
COA#: 14-87-00417-CR

RE: Case No. 0234-89
STYLE: Huggins, Ben Charleston

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 26, 1989
COA#: 14-87-00423-CR

RE: Case No 0235-89
STYLE: Lee, [Jr.,] Franklin S.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

OFFICIAL NOTICES FROM THE COURT OF CRIMINAL APPEALS DENYING JOINT MOTION FOR REHEARING
(May 24, 1989 and June 7, 1989)
(Insignificant matters omitted.)

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 7, 1989
COA#: 14-87-00323-CR

RE: Case No 0233-89
STYLE: Erlandson, Paul

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 7, 1989
COA#: 14-87-00424-CR

RE: Case No 0236-89
STYLE: Hawley, Steven Xavior

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

May 24, 1989
COA#: 14-87-00417-CR

RE: Case No 0234-89
STYLE: Huggins, Ben Charleston

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 7, 1989
COA#: 14-87-00423-CR

RE: Case No 0235-89
STYLE: Lee, [Jr.,] Franklin S.

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk